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Nos. 94-1893, 94-1900

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In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, ET AL.;
NATIONAL CABLE TELEVISION ASSOCIATION,
Petitioners,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE
COMPANY OF VIRGINIA, ET AL., *Respondents*.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE UNITED STATES TELEPHONE ASSOCIATION, NATIONAL TELEPHONE COOPERATIVE ASSOCIATION, ORGANIZATION FOR THE PROTECTION AND ADVANCEMENT OF SMALL TELEPHONE COMPANIES, AMERITECH CORPORATION, BELLSOUTH CORPORATION, FRONTIER CORPORATION, NYNEX CORPORATION, PACIFIC TELESIS GROUP, SBC COMMUNICATIONS INC., THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY, AND U S WEST, INC., AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI CURIAE

Amici curiae are companies (and industry associations whose members are companies) that provide telecommunications services to the general public, including local telephone service regulated as common carriage under state laws and the federal Communications Act of 1934.[1] *Amici* file this brief in opposition to petitioners' contention that the Court should summarily vacate the judgment of the court of appeals and remand for further proceedings. *Amici* strongly support respondents' position that the Court should grant certiorari and decide the important constitutional question presented; alternatively, the Court should simply deny certiorari.[2]

Amici, like respondents, are involved in litigation concerning the constitutionality of 47 U.S.C. § 533(b), which prohibits telephone companies from providing "video programming" directly to subscribers within their service areas. In nine other cases (involving these *amici* and *amicus* GTE Service Corporation), as in this case, federal courts have struck down Sec-

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[1] *Amici* United States Telephone Association, National Telephone Cooperative Association, and Organization for the Protection and Advancement of Small Telephone Companies are industry associations whose members — approximately 1400 companies — include virtually all of the traditional local telephone companies in the United States. *Amici* Ameritech Corporation, BellSouth Corporation, Frontier Corporation, NYNEX Corporation, Pacific Telesis Group, SBC Communications Inc., Southern New England Telephone Company, and U S West, Inc. are some of the largest companies whose affiliates or subsidiaries are engaged in the business of providing communications services, including local telephone service. Together with respondents and *amicus* GTE Corporation, *amici* represent virtually every company subject to the free speech restriction in 47 U.S.C. § 533(b).

[2] The parties' letters of consent to the filing of this brief have been filed with the Clerk pursuant to Rule 37.3 of the Rules of this Court.

tion 533(b) as a facial violation of the First Amendment.[3] *Amici* therefore have a substantial interest in this Court's determination of the constitutionality of Section 533(b).

ARGUMENT

Amici file this brief to oppose the government's extraordinary suggestion that this Court vacate the court of appeals' decision holding Section 533(b) unconstitutional on its face, merely because the Federal Communications Commission has suggested that in the future (in circumstances that it has not yet determined), it will waive application of a statute that it has been enjoined from enforcing. There is no basis for this Court to remand the case to the Fourth Circuit as petitioners have requested. The Commission should not be allowed to nullify an adverse judicial ruling merely by announcing in vague terms that it might no longer apply the statute as written. The Commission's recent decision is devoid of meaning in practical terms — in particular, it fails to address the reasons set forth by the Fourth Circuit and other courts for holding the statute unconstitutional — and should be rejected by this Court as a transparent litigation tactic.

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[3] *U S West, Inc.* v. *United States*, 48 F.3d 1092 (9th Cir. 1994); *Pacific Telesis Group* v. *United States*, 48 F.3d 1106 (9th Cir. 1994); *Southern New England Tel. Co.* v. *United States*, No. 3:94-CV-80 (DJS) (D. Conn. Apr. 27, 1995); *Southwestern Bell Co.* v. *United States*, No. 3:94-CV-0193-D (N.D. Tex. Mar. 27, 1995); *GTE South, Inc.* v. *United States*, No. CA-94-1588-A (E.D. Va. Feb 10, 1995), appeal pending 4th Cir. No. 95-1738; *United States Tel. Ass'n* v. *United States*, No. 1:94CV01961 (D.D.C. Feb. 14, 1995), appeal pending D.C. Cir. No. 95-5117; *NYNEX Corp.* v. *United States*, No. 93-1523-P-C (D. Me. Dec. 8, 1994), appeal pending 1st Cir. No. 95-1183; *BellSouth Corp.* v. *United States*, 868 F. Supp. 1335 (N.D. Ala. 1994), appeal pending 11th Cir. No. 94-7036; *Ameritech Corp.* v. *United States*, 867 F. Supp. 721 (N.D. Ill. 1994), appeal pending 7th Cir. No. 95-1223.

After the district court's decision in this case, many of these *amici* sought to intervene in the action, to avoid the necessity of repetitive litigation, acknowledging that they would thereby be bound by the final decision on appeal. See CA App. 16 (docket entries). The government insisted, however, that it was entitled to defend the statute against each of the companies separately. See Gov't Defendants' Mem. in Opp. to Motions to Intervene 10 n.21, 15. In deference to that position, the district court reluctantly denied the motion to intervene. See CA App. 94-95 (order); see also Tr. 63 (Sept. 30, 1993) (denying motion "with reluctance"). Accordingly, the industry has been forced to proceed piecemeal with nine separate lawsuits and attendant appeals, at great expense to itself, the government, the judicial system, and the public. The government has lost in *every* court — indeed, before *every* judge. We consider it outrageous that the government now is arguing that the matter be subjected to additional rounds of litigation, on the basis of "changed circumstances" wholly of its own making.

In this and nine other cases in federal courts around the country, telephone companies have won recognition of their constitutional right to engage in video speech. In every case, before every court, Section 533(b) has been held unconstitutional *on its face* — that is, in *every application*. Now — after years of litigation, when this Court finally has the opportunity to resolve the constitutionality of Section 533(b) — the Commission claims to have discovered a broad power to waive the video programming ban whenever it believes that competition and diversity would be advanced thereby.[4] The

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[4] The Commission makes no secret of the fact that the *Third Report and Order* is motivated by the desire to avoid and set aside adverse court decisions. See *Third Report and Order*, Gov't Supp. Br. App. 7a ("By implementing a 'more speech-friendly' plan * * * we make it unnecessary for those courts to decide whether a complete prohibition on video programming by telephone companies in

FCC has announced its future intention to grant waivers "routinely" to permit telephone companies to provide video programming where they undertake to provide common carrier video transport and they promise to abide by certain unspecified requirements. Gov't Supp. Br. App. 19a.

Neither the vague promises of future intent announced in the *Third Report and Order* nor any elaboration of those promises could justify the extraordinary relief requested by the government. In itself, the *Third Report and Order* does nothing: no telephone company has been given permission to engage in video speech (as is their constitutional *right*, according to the decision below and those in nine other cases). Amazingly, the FCC does not tell us the terms on which such permission might be granted in the future; we have yet to see whether the terms will be economically or technologically feasible.[5] The *Third Report and Order*, like other orders in this docket (see note 7, *infra*), will likely be altered in the process of judicial review and administrative reconsideration. There is no way to know how long it will take to sort all of this out, except that it is likely to take years. Once it is sorted out, there is no way to know how long it will take for the

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their exchange areas is constitutional").

[5] The new policy addresses only the future prospect of telephone companies providing video programming on a "video dialtone" platform. *E.g.*, Gov't Supp. Br. App. 4a-5a. The Court should be aware that "video dialtone" is still at a conceptual and experimental stage; no actual, technologically and commercially viable, video dialtone system has ever been put into place. The particular regulatory requirements to be attached to such a system could well doom it as a realistic means for delivering video programming. In the meantime, if the government's suggestion is accepted, telephone companies will continue to be barred from all the other ways in which they might exercise their First Amendment rights to engage in video speech.

FCC actually to grant waivers.[6] And, of course, there is no way to know whether the Commission will again change its mind, once the immediate threat of this constitutional litigation has been averted. In short, this is the "sort of administrative law shell game" referred to in *MCI Telecommunications* v. *AT&T*, 114 S. Ct. 2223, 2227 (1994) (quoting 978 F.2d 727, 731-32 (D.C. Cir. 1992)).[7]

Even if the FCC had provided a clear announcement that it would waive application of the statute in particular circumstances, vacatur would not be appropriate. This Court has consistently rejected attempts by defendants to avoid appellate review merely by voluntary cessation of unconstitutional conduct. See, *e.g.*, *City of Mesquite* v. *Alladin's Castle, Inc.*, 455 U.S. 283, 288-289 (1982); *Chicago Teacher's Union* v.

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[6] The undisputed record in this case demonstrates that issuance of "good cause" waivers is a very rare event, is likely to be appealed, and frequently takes years when a waiver is granted at all. CA App. 8725 (Joint Stipulations of Fact); *NCTA* v. *FCC*, 914 F.2d 285 (D.C. Cir. 1990).

[7] The history of the FCC's decision-making in this area includes other efforts to avoid judicial review. In 1992, when the Commission first definitively concluded that it should recommend repeal of the statutory ban on telephone company provision of video programming, that decision was challenged in the D.C. Circuit by NCTA and others. The FCC convinced the D.C. Circuit to stay its consideration of the appeal while the FCC resolved administrative petitions for reconsideration. *Mankato Citizens Tel. Co.* v. *FCC*, No. 92-1404 (D.C. Cir. Sept. 9, 1992). The reconsideration phase took over two years, culminating in a new order on November 7, 1994 (See 59 Fed. Reg. 63971), which itself was appealed to the D.C. Circuit. In the meantime, however, the FCC granted a number of applications for video dialtone facilities, and those orders have also been appealed. The FCC has asked the D.C. Circuit to stay consideration of all those appeals while the Commission resolves petitions for reconsideration of its November 7, 1994 order.

Hudson, 475 U.S. 292, 305 n.14 (1986); *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632-633 (1953). Here, of course, the relief requested by the government — vacatur of the Fourth Circuit's decision without any substantive review by this Court — is even more unprecedented. As noted above, the *Third Report and Order* in fact changes nothing in this litigation: it merely announces a prospective policy, which might not be consistent with the statute, which might not even apply to the respondents, and which the FCC might well reverse once it is free of the injunctions prohibiting the statute's enforcement.

There is no point to the government's suggestion, other than delay and expense. If the government truly believes that its new-found capacity to grant discretionary waivers affects the constitutional issue in this case, then it can argue that position in its brief on the merits.[8] Moreover, if the government believes that a different regulatory regime than the one now in existence would pass constitutional muster, then it is free to enact that regime and let its legality be tested in due course. But none of this is a legitimate justification for frustrating prompt resolution of claims of a constitutional right to speak.

Even if the statute authorized the FCC's newly discovered position concerning its waiver authority,[9] and even if the FCC

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[8] The government cites *United States* v. *X-Citement Video, Inc.*, 115 S. Ct. 464, 467 (1994), for the proposition that a newly discovered interpretation of a statute should be considered on Supreme Court review of the constitutionality of the statute. Gov't Supp. Br. 3-4. But *X-Citement Video* provides no support for the suggestion that the appellate court decision be vacated and the case remanded for reconsideration on the basis of that changed interpretation. To the contrary, the Court reviewed and decided *X-Citement Video* on the merits. The Court should do so here as well.

[9] Waivers may be granted only in situations in which "the issu-

had announced an actual policy (rather than merely the vague promise of future action based on presently unknown factors and conditions), the agency's discretionary policy to grant or deny speech rights could not resolve the constitutional problems presented in this case. *City of Cincinnati* v. *Discovery Network, Inc.*, 113 S. Ct. 1505, 1513-1514 n.19 (1993) (striking down a regulatory licensing scheme that vested "unbridled discretion in a government official"); *Secretary of State* v. *J.H. Munson Co.*, 467 U.S. 947, 964 n.12 (1984) (noting constitutional concerns raised by a statute that "plac[es] discretion in the hands of an official to grant or deny a license"); see also *id.* at 968 ("[t]he possibility of a waiver may decrease the number of impermissible applications of the statute, but it does nothing to remedy the statute's fundamental defect").

At best, the *Third Report and Order* may allow *some* telephone companies, on terms *to be specified in the future*, in the *discretion* of the Commission, to engage in *some forms* of video speech. By contrast, under the decision below, these companies have a *constitutional right* to engage in video speech *now*, because the government failed to demonstrate a constitutionally valid justification for silencing them. We are at a loss to understand how the government's grudging willingness, under pressure of adverse court rulings, to give limited discretionary permission for some speech, can possibly

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ance of such waiver is justified by the petitioner, taking into account the policy of this subsection." 47 U.S.C. § 533(b)(4). The Commission seeks to base the waivers contemplated by the *Third Report and Order*, however, not on the policy of the subsection, but rather on its *repudiation* of that policy. The government's litigating position in this and related cases has been that the Congressional policy in enacting Section 533(b) was to enhance competition in the cable industry by *barring* telephone companies from providing video programming in their telephone service areas. See, *e.g.*, Pet. App. 17a-18a; see also *NCTA*, 914 F.2d at 289.

substitute for the constitutional right recognized by the court below (and by every other court to have considered the issue).

If plaintiffs had successfully challenged a state law banning political demonstrations in a public park, this Court would not vacate the judgment and remand merely because the sheriff announced — in response to multiple court injunctions — that he would waive the ban on demonstrations, in future unspecified circumstances, for "good cause." Although the technology in this case may be more complex, the principle is the same.

In sum, the court below has declared a federal statute unconstitutional. It is essential that both the government and the industry regulated by the statute know, as expeditiously as possible, whether that decision is correct. Telephone companies across the nation are poised to invest substantial resources in constructing the infrastructure needed to bring competition to this previously monopolized medium of communication. The government should not be allowed — after having lost in every court — to prolong the uncertainty preventing this important development. Accordingly, the Court should promptly grant review and set the case for plenary briefing and oral argument.

CONCLUSION

The petition for a writ of certiorari should be granted, and the government's suggestion that the judgment of the court of appeals be vacated and the case remanded for further proceed-

[illegible] should be rejected. In the alternative, the Court should deny certiorari.

Respectfully submitted.

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